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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,
v.
FRANCES HOUSTON and KENNETH WOODBURY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal court with diversity jurisdiction violate the constitutionally-mandated rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), when it disregards relevant holdings of the state's highest court and creates a novel rule of state law?

2. Pursuant to the Full Faith and Credit Act (28 U.S.C. § 1738 (1988)) and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), may a federal court with diversity jurisdiction deny collateral estoppel effect to a state court ruling that would be given preclusive effect in the courts of that state?

3. Where state trial courts have decided an issue of state law that is dispositive of a claim pending before a federal court with diversity jurisdiction, and the state's highest court has declined to accept certification of that issue for further review, must the federal court follow those trial court decisions or consider them as evidence of state law?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs

Frances Houston
Kenneth Woodbury

Defendant

St. Paul Fire and Marine Insurance Company

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner St. Paul Fire and Marine Insurance Company discloses that it is a corporation, that it is wholly owned by The St. Paul Companies, Inc., and that, besides wholly-owned subsidiaries, the only subsidiary it owns is The John Nuveen Company.

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PETITION FOR WRIT OF CERTIORARI

The St. Paul Fire and Marine Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., at 1a-12a) is reported at 55 F.3d 1420. The opinion of the district court (App., at 13a-15a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 26, 1995. A timely petition for rehearing with a suggestion for rehearing en banc was denied on July 13, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

Section 1738 of Title 28 of the United States Code provides in relevant part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1988).

STATEMENT OF THE CASE

Petitioner St. Paul Fire and Marine Insurance Company ("St. Paul") filed this declaratory judgment action to determine whether a criminal child molester, Kenneth McQuade ("McQuade"), is covered under his employer's professional liability insurance policy for claims against him arising out of his crimes against Respondent Kenneth Woodbury ("Woodbury") while McQuade was an employee of Big Brothers/Big Sisters of Juneau, Inc. ("Big Brothers/Big Sisters"). Federal court jurisdiction was based upon diversity of citizenship. 28 U.S.C. § 1332 (1988).

The district court entered judgment for St. Paul, holding that Alaska's public policy against insuring inten-

tional injuries barred coverage for McQuade for his criminal child abuse under Big Brothers/Big Sisters' professional liability policy. The Court of Appeals for the Ninth Circuit reversed the district court.[1] While recognizing that Alaska public policy precludes insurance coverage for intentional injuries, the court of appeals created an exception, unsupported by Alaska law, for cases in which the insurance proceeds are to be paid to compensate a victim of intentionally inflicted injuries. The court of appeals then failed to follow relevant Alaska rules of *collateral estoppel*. In this way, the court of appeals was able to find coverage under the Big Brothers/Big Sisters insurance policy for McQuade's criminal child abuse even though the Alaska Superior Court previously had reached a decision on the same facts that mandated the very opposite conclusion. Certiorari should be granted and the decision below summarily reversed.

A. Factual Background

McQuade was the Executive Director of Big Brothers/Big Sisters in Juneau, Alaska during the early 1980s. While employed in that position, McQuade began to sexually abuse Woodbury, the minor child of Respondent Frances Houston ("Houston"), and arranged to have himself matched as a "big brother" to him.[2] McQuade continued to molest Woodbury following his resignation from Big Brothers/Big Sisters until his arrest in 1986. After pleading no contest to several charges of sexual abuse of a minor, McQuade was sentenced to 25 years in prison.

Houston then brought a civil suit in Alaska Superior Court on behalf of herself and Woodbury against Mc-

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[1] Judge Canby authored the opinion of the Ninth Circuit; Judges Boochever and Pregerson concurred.

[2] The court of appeals adopted the convention of using the initials K.W. to refer to Woodbury and F.H. to refer to Houston.

Quade and Big Brothers/Big Sisters.[3] Both defendants tendered their defense to St. Paul under a professional liability policy issued to Big Brothers/Big Sisters that was in effect at all relevant times. The policy stated, in pertinent part, that:

> The named insured shall include any individual or organization named in the Coverage Summary. It also includes any partner, executive officer, director, stockholder or employee working for you *within the scope of their duties.*

(App., at 4a) (emphasis added.)

Although St. Paul refused to defend or indemnify the claims against McQuade, St. Paul did defend the claim against Big Brothers/Big Sisters. Big Brothers/Big Sisters moved for partial summary judgment, arguing that it could not be held vicariously liable because McQuade was not acting within the scope of his employment by Big Brothers/Big Sisters when he was committing criminal acts of child molestation. After briefing and oral argument, the Alaska Superior Court agreed, granting partial summary judgment in favor of Big Brothers/Big Sisters on the theory of *respondeat superior.* (App., at 28a)

Following this ruling, but before the entry of final judgment, Houston and Woodbury entered into a settlement with Big Brothers/Big Sisters and dismissed with prejudice all claims against the organization. Houston and Woodbury did not, however, move to have the adverse ruling on *respondeat superior* withdrawn. Subsequently, Houston and Woodbury also settled with McQuade, who confessed judgment in favor of Houston and Woodbury in an amount in excess of $1 million and assigned to them any rights he might have against

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[3] *Frances Houston v. Kenneth McQuade,* Civ. No. 1JU-86-2464, (Alaska Super. Ct., First Judicial Dist. Juneau) ("Superior Court action").

St. Paul in exchange for their agreement not to execute on the judgment against him.

B. Proceedings Below

St. Paul filed this action in the United States District Court for the District of Alaska, seeking a declaration pursuant to 28 U.S.C. § 2201 (1988) that it was not obligated to indemnify or defend McQuade for any acts of criminal sexual abuse and was not liable to pay the stipulated judgment entered in the Superior Court action between Houston and Woodbury and McQuade. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (1988). Woodbury and Houston, as assignees of whatever rights McQuade may have under the policy, answered and counterclaimed for a declaration of coverage. Both sides moved for summary judgment.

Respondents once again argued for coverage of McQuade's criminal acts, claiming that he was acting within the scope of his duties as Executive Director of Big Brothers/Big Sisters. That argument raised the potential applicability of the Alaska Supreme Court's intervening decision in *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990), which held that a trier of fact could find sexual conduct by a psychotherapist to be "reasonably incidental" to his employment as a therapist due to the alleged existence of a "transference" phenomenon. *Id.* at 348. Judge Singleton, questioning whether the Alaska Supreme Court might extend its holding in *Doe* beyond the psychotherapist-patient relationship, certified two questions on issues of Alaska law to the Alaska Supreme Court:

1. Under the rule of *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990), and consistent with Alaska public policy, are the actions of Kenneth McQuade within the scope of his duties of employment and thus covered by the insurance coverage provided to Big Brothers/ Big Sisters of Juneau by St. Paul?

> 2. What is the effect, if any, of the intervening decision of *Doe v. Samaritan Counseling Center* upon the collateral estoppel effect of [the Alaska Superior Court's] prior ruling in favor of Big Brothers/Big Sisters on that entity's respondeat superior liability for the actions of Kenneth McQuade, and the implicit ruling that McQuade's actions were not "within the scope of his duties" as that phrase is used to demarcate coverage in the policy?

(App., at 16a-25a) The Alaska Supreme Court declined to answer the questions (*see* App., at 26a), thereby suggesting that Alaska law was sufficiently clear and that further elucidation was not required.

The district court thereupon ruled on the summary judgment motions. The district court concluded that the Alaska Supreme Court would follow the prediction of Alaska law made by fellow United States District Judge Fitzgerald in *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815 (D. Alaska 1987), and find that it is against Alaska public policy to permit a person to be insured for non-accidental injuries and intentional acts of sexual abuse and child molestation. (App., at 13a-15a) Houston and Woodbury appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit.

The court of appeals reviewed *de novo* the summary judgment motions. St. Paul argued, as it had before the district court, that Houston and Woodbury were collaterally estopped by the Superior Court's ruling on *respondeat superior* from relitigating the issue of whether McQuade's acts of child molestation were committed within the scope of his duties of employment by Big Brothers/Big Sisters. St. Paul further argued that, under Alaska law, McQuade's tortious and criminal acts could not have been within the scope of his employment duties and, therefore, could not be covered by the insurance policy. St. Paul cited, among other cases, the Alaska Superior Court's decision in

Ciarochi v. Boy Scouts of Am., Inc., No. 1KE-89-42, Memorandum Opinion and Order (Alaska Super. Ct. First Judicial Dist. Ketchikan, Aug. 6, 1990), which held that acts of sexual abuse committed by a scoutmaster were not within the scope of his authority. (App., at 30a-50a)[4]

While recognizing that Alaska public policy does not permit insurance coverage for intentional acts, the Ninth Circuit nevertheless concluded that Alaska would make an exception to that policy in order to indemnify an insured for injuries resulting from his intentional acts where such indemnification would result in the compensation of an innocent victim of child molestation. (App., at 9a) This novel exception has never been recognized, hinted at, or intimated by any Alaska court or any other reported state or federal court in a case of child molestation. Moreover, the exception that the Ninth Circuit predicted the Alaska Supreme Court would recognize is entirely result-oriented, as it makes the existence of coverage turn solely on who receives the proceeds.

After creating a previously unrecognized exception to Alaska public policy barring insurance coverage for intentional injuries, the Ninth Circuit then considered the question of whether McQuade was covered under the policy, *i.e.*, was he acting within the scope of his duties when he sexually assaulted Woodbury. In contravention of established Alaska law, the Ninth Circuit denied collateral estoppel effect to the Alaska Superior Court's ruling on the issue of *respondeat superior*. Despite the certain knowledge as to how an Alaska court would rule on the issue, including the Alaska Superior Court's ruling in the underlying liability litigation and the *Ciarochi* decision, the Ninth Circuit then held that McQuade's intentional acts

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[4] The *Ciarochi* court distinguished *Doe v. Samaritan Counseling Center* on the grounds that sexual abuse of a minor is not "reasonably incidental" to a scoutmaster's legitimate activities. (App., at 38a-39a). The Alaska Supreme Court denied interlocutory review of the Superior Court's decision, *Ciarochi v. Boy Scouts of Am.*, No. S-4112 (Alaska, Sept. 28, 1990). (App., at 51a)

of criminal child molestation were within the scope of his duties for purposes of insurance coverage. (App., at 10a) The court made its decision on the scope of McQuade's duties without referring to any law, Alaska or otherwise.

St. Paul timely petitioned for rehearing and suggested rehearing en banc. The Ninth Circuit denied the petition and rejected the suggestion for rehearing en banc. (App., at 27a)

REASONS FOR GRANTING THE PETITION

In *Salve Regina College v. Russell,* 499 U.S. 225 (1991), this Court concluded that a federal court of appeals should review *de novo* a district court's determination of state law. The Court held that appellate deference to district court determinations of state law was inconsistent with the "twin aims" of *Erie*—discouragement of forum shopping, and avoidance of inequitable administration of the laws—and denied access to meaningful review of state law claims. Absent definitive direction in ascertaining state law, however, the evil of according deference to district court decisions is simply replaced by the evil of unfettered discretion in the federal appellate courts.

Here, *de novo* review without reference to the limited role of the federal court in applying state law has resulted in a decision that is flatly contrary to the result required by *Erie*. This case provides the Court with the opportunity to clarify the role of the federal courts of appeals in exercising their responsibility to review state law issues independently. In doing so, the Court has the opportunity to address the weight to be accorded determinations of law by state trial courts under the *Erie* doctrine and, in correcting the Ninth Circuit's errors, to emphasize the fundamental principles of federalism embodied in the Full Faith and Credit Act.

I. PROPER *ERIE* ANALYSIS MUST FOCUS ON WHAT *WOULD* OCCUR IN A STATE COURT RATHER THAN ON THE FEDERAL COURT'S VIEW OF WHAT *SHOULD* OCCUR.

Since this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64, it has been clear that the Constitution mandates the application of state, rather than federal, decisional law in diversity cases. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Court explained the fundamental *Erie* principle:

> [I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.

Id. at 109.

Erie called for the application of the forum State's law "declared by its Legislature . . . or by its highest court." 304 U.S. at 78. In the aftermath of *Erie*, some federal courts assumed that the doctrine was entirely inapplicable if neither state institution had decided the precise issue. This independent approach was bolstered by the Court's language in *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103 (1939):

> [S]ince the Supreme Court of Texas holds itself free upon reconsideration to modify or recede from its own opinions . . . the court below. . . was likewise free to depart from the earlier rulings. . . .

Id. at 107 (citations omitted).

This Court has never expressly held that approach invalid or definitively articulated the process by which federal courts are to determine state law. In order to avoid the anomalous results of the sort concocted by the court of appeals in this case, the Court should make clear that the duty of the federal courts, whether at the trial or appellate level, is to predict what the forum state court

would decide and not to substitute their own views under the guise of *de novo* review.

In *Salve Regina*, the Court adverted to *Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943), for guidance:

> [S]tate law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law."

499 U.S. at 277. An indication of the "applicable principles" for determining state law is found in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956). Holding there that a 1910 Vermont Supreme Court decision was binding on a federal court in 1956, this Court pointed out that,

> there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.

Id. at 205.

There likewise is no confusion in this case about Alaska public policy, which the Ninth Circuit explicitly recognized bars insurance coverage for intentional acts. (App., at 7a) While *Bernhardt* implicitly recognized that federal courts should be sensitive to possible changes in the state laws they are required to apply under *Erie*, there is no indication here that Alaska law has changed or, in view of the Alaska Supreme Court's refusal to consider the questions certified by the district court in this case, that there is any uncertainty about Alaska law.

In this case, therefore, the inquiry should have ended once the Ninth Circuit recognized that Alaska public

policy prohibits "insuring a person against liability for his or her intentional acts." (App., at 7a) Instead, however, the panel embarked on a fanciful exploration of lower court decisions from unrelated jurisdictions to predict that an Alaska court would carve out an exception to its general public policy to provide coverage of intentional acts where an innocent party would be compensated by the insurance proceeds. Such an exception has not been recognized in any other case involving child molestation.

Even if, in the view of the federal court or the courts of other states, a rule of law announced by a state's high court is anomalous, antiquated, or simply unwise, it must be followed unless there are very persuasive grounds for believing the state's highest court would no longer adhere to it. *See Ideal Structures Corp. v. Levine Huntsville Dev. Corp.*, 396 F.2d 917, 924 (5th Cir. 1968) ("Though federal courts should keep abreast with imminent change, our footing should be reasonably sure, if not absolutely certain"); *see also Hausman v. Buckley*, 299 F.2d 696, 704 (2d Cir.) ("[T]he proper function of this Court is to ascertain what New York law is, and not to speculate about what it will be, or in Learned Hand's felicitous phrase, 'to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant' "), *cert. denied*, 369 U.S. 885 (1962).

Instead, the Ninth Circuit in this case eviscerated what it recognized to be Alaska public policy through the bizarre expedient of recognizing an exception "that the Alaska courts have not yet addressed." (App., at 7a) The court of appeals then created a novel and highly troubling rule of law in order to confer insurance coverage on a convicted child molester. (App., at 9a) This exception—*i.e.*, compensation for innocent victims—swallows the rule. An act of intentional harm *always* has an innocent victim and that victim is entitled to compensation from the malfeasor whenever the liability claim is

successfully prosecuted. Thus, there will *always* be insurance coverage for acts of intentional harm under the Ninth Circuit's rule.

This is precisely the kind of inequitable administration of the law that the *Erie* doctrine was designed to prevent. For that reason, this case presents a perfect opportunity for this Court to make plain that once the federal court of appeals finds relevant state law on point, it must take that law as it exists and not expand on it. *Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) ("Under *Erie* [citation omitted], the federal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion.") The inquiry must focus on what *would* occur in state court rather than on the federal judiciary's view of what *should* occur. *See Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) (proper function of federal court in diversity case "is to ascertain what the state law is, not what it ought to be.")

II. THE NINTH CIRCUIT VIOLATED THE FULL FAITH AND CREDIT ACT AND THE *ERIE* DOCTRINE BY IGNORING SETTLED ALASKA LAW AS TO WHAT CONSTITUTES A "FINAL JUDGMENT" FOR PURPOSES OF APPLYING COLLATERAL ESTOPPEL TO A PRIOR STATE COURT RULING.

"It has long been established that [the Full Faith and Credit Act, 28 U.S.C.] § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982). To the contrary, § 1738 requires federal courts to give the same preclusive effect to a state court judgment as would be given to the judgment under the law of the state in which it was rendered. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 96 (1980) (citing *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 193 (1941)

and *Davis v. Davis*, 305 U.S. 32, 40 (1938)); *Kremer v. Chemical Constr. Corp.*, 456 U.S. at 461, 481-82 (citing *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839) and *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813) (§ 1738 goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken)); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (citing *Allen* and *Kremer* ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.")); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (citing *Kremer* and *Allen* ("Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts")).

Under Alaska law, a "final judgment" for purposes of issue preclusion includes " 'any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.' " *Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628, 634 (Alaska 1993) (citing *Briggs v. State Dep't of Pub. Safety*, 732 P.2d 1078, 1082 (Alaska 1987) (citations omitted)). A stipulation to dismiss claims with prejudice operates as an adjudication on the merits and is *res judicata* as to all issues that were raised or could have been determined under the pleadings, with the same effect as a final judgment after trial. *Tolstrup v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986) (citations omitted).

In the underlying liability litigation, the Alaska Superior Court granted Big Brothers/Big Sisters' motion for partial summary judgment on the theory of *respondeat superior*, implicitly ruling that acts of child molestation were not within the scope of McQuade's employment. The state court's ruling on the issue of *respon-*

deat superior was dispositive of the coverage issue in this declaratory action: if McQuade's tortious and criminal acts of sexual abuse of a minor were not "within the scope of his employment" for purposes of the doctrine of *respondeat superior,* then *a fortiori* those acts could not have been "within the scope of [his] duties" of employment within the meaning of the coverage section of the insurance policy.[5]

Following entry of summary judgment for Big Brothers/Big Sisters on *respondeat superior* liability in the Alaska Superior Court, Woodbury and Houston settled with Big Brothers/Big Sisters, dismissing with prejudice all claims against the organization. (App., at 29a) Under *Tolstrup v. Miller,* therefore, the Superior Court's ruling on *respondeat superior* has the same effect as a final judgment after trial. Oblivious to *Tolstrup,* however, the Ninth Circuit refused to accord collateral estoppel effect to the state court's ruling solely on the basis that it was not sufficiently "final" because the plaintiffs had settled with Big Brothers/Big Sisters before the entry of final judgment. (App., at 10a-11a)[6]

Since the state court's ruling on the issue of *respondeat superior* in the underlying litigation would have been entitled to collateral estoppel effect in subsequent state court proceedings, § 1738 required that it be given the same

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[5] As the district court concluded, the policy language "within the scope of their duties" is equivalent to "within the scope of their employment," the typical phrasing of *respondeat superior* liability. (App., at 24a) (referencing *Horace Mann Ins. Co. v. Analisa N.*, 214 Cal. App. 3d 850, 262 Cal. Rptr. 61, 63 (Cal. Ct. App. 1989)).

[6] Under Alaska law, there are three elements for the application of collateral estoppel: (1) the plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action; (2) the issue to be precluded from relitigation must be identical to that in the first action; (3) the issue in the first action must have been resolved by a final judgment on the merits. *Borg-Warner Corp.*, 850 P.2d at 634 (citing *Murray v. Feight*, 741 P.2d 1148, 1153 (Alaska 1987)).

preclusive effect by a federal court with diversity jurisdiction. Accordingly, the Ninth Circuit's decision denying collateral estoppel to the state court's decision violated the Full Faith and Credit Act and resulted in plainly inconsistent judgments on the same dispositive issue—*i.e.*, whether or not acts of child molestation were within McQuade's duties of employment by Big Brothers/Big Sisters.

Permitting a litigant to avoid the otherwise preclusive effect of an adverse state court judgment also contravenes the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of the inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (footnote omitted). Indeed, as this Court stated more than fifty years ago,

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

Guaranty Trust Co. v. York, 326 U.S. at 109.

A "substantially different result" from the same set of facts is precisely what happened here as a result of the Ninth Circuit's decision to deny collateral estoppel effect to the ruling of the Alaska Superior Court on *respondeat superior*. By doing so, the Ninth Circuit was able to re-examine the very issue that the state court previously had decided adversely to the plaintiffs. And, contrary to the state court's decision, the Ninth Circuit found that McQuade's unlawful acts of child molestation were within the scope of his duties of employment by Big Brothers/Big Sisters. (App., at 10a)[7]

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[7] The tortured logic underlying the Ninth Circuit's decision demonstrates its result-oriented approach. Thus, the court of appeals found coverage based on acts within the scope of McQuade's duties that *enabled* him to commit criminal acts of child molestation

The Ninth Circuit's ruling permits a party that lost a dispositive issue in a state court proceeding to avoid the preclusive effect of that decision by settling the state court case before final judgment is entered and relitigating the same issues in federal court on the grounds that the issues were not sufficiently "final" in the state court action. The effect of this decision, if permitted to stand, will be to discourage settlement of state court litigation by subjecting insurers to the risk of re-litigation of state law issues. There is simply no incentive for an insurer to settle underlying liability litigation if the same issues that were thought to be resolved by the state action are subject to a completely different outcome in a coverage action in federal court.

III. THE NINTH CIRCUIT VIOLATED THE *ERIE* DOCTRINE WHEN IT DECIDED, WITHOUT REFERENCE TO ANY STATE LAW, THAT A CHILD MOLESTER WAS ACTING WITHIN THE SCOPE OF HIS DUTIES OF EMPLOYMENT, IGNORING DECISIONS OF ALASKA TRIAL COURTS ON THE SAME MATTER THAT THE ALASKA SUPREME COURT HAD CHOSEN NOT TO REVIEW.

Where a state's highest court has not decided an issue that is before a federal court, the federal court must look to relevant rulings of the other courts of the state, giving them "proper regard" in deciding what the law of the state is. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940); *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940). Although, generally, a federal court need not follow the decision of a state trial court if that decision would not be binding on

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even though it recognized that the ultimate acts themselves were *personal*. (App., at 9a) Under this logic, Big Brothers/Big Sisters could equally well have been held vicariously liable under the theory of *respondeat superior* if McQuade had committed any other kind of crime at Woodbury's home, as long as some duty of employment, however remote, took him there.

any state court, *King v. Order of United Commercial Travelers*, 333 U.S. 153, 161 (1947), this does not mean "that federal courts need never abide by determinations of state law by state trial courts." *Id.* at 162. In *Fidelity Union Trust Co. v. Field*, 311 U.S. at 178, for example, this Court held that decisions of the New Jersey Chancery Court are entitled to the same deference as decisions of the state's highest court.

This case presents the Court with an opportunity to clarify precisely when federal courts should follow determinations of law by state trial courts, as previously the question has been left to the discretion of the lower federal courts. The majority of federal courts follow the precedent established by *King v. Order of United Commercial Travelers*, 333 U.S. at 161, and *Commissioner v. Estate of Bosch*, 387 U.S. at 465, giving state trial court decisions some weight in their determination of state law, but not following them as precedent.[8] A minority, following *Fidelity Union Trust Co.*, have considered the specific situations when a state trial court decision should have stare decisis effect.[9]

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[8] *See, e.g., Rippstein v. City of Provo*, 929 F.2d 576, 578 (10th Cir. 1991) (though not binding, state trial court opinion is, at least, evidence of what state courts would do under circumstances); *Finch v. Mississippi State Med. Ass'n*, 594 F.2d 163, 165 (5th Cir. 1979) (quoting *Commissioner v. Estate of Bosch*, 387 U.S. at 465 and *West v. AT&T*, 311 U.S. 223, 237 (1940) (state trial court decision not controlling, but followed where federal court not " 'convinced by other persuasive data that the highest court of the state would decide otherwise' ")); *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 204 n.15 (2d Cir. 1978) (decision by lower court state judge in mainstream of state decisions entitled to some respect) (citation omitted), *cert. denied*, 439 U.S. 1034 (1978).

[9] *See, e.g., Dennis v. Railroad Retirement Bd.*, 585 F.2d 151, 154 (6th Cir. 1978) (probate court decision should be followed when: 1) issue determined by state court of competent jurisdiction; 2) issue genuinely contested by parties with opposing interests; 3) issue is one traditionally reserved to states; and 4) resolution by trial court is consistent with law enunciated by highest court in State); *Gerr v. Emrick*, 283 F.2d 293, 295 (3d Cir. 1960) (citing

A. Because the Alaska Trial Court Decision as to Scope of Employment Had Been Put Before the Alaska Supreme Court and Not Disapproved, it Should Have Been Followed by the Ninth Circuit.

In the instant case, the federal court should have followed unambiguous state law precedent directly on point —that is, the Alaska trial court's grant of partial summary judgment on the issue of *respondeat superior* in the underlying liability suit. That ruling is a clear indication of how Alaska's highest court would rule on the issue of whether acts of child molestation can be within the scope of employment. *Warwick v. State*, 548 P.2d 384, 394-95 (Alaska 1976) (unpublished superior court decision can be grounds for reliance as statement of law). Moreover, the Alaska Supreme Court effectively ratified the trial court's ruling when it declined to accept the district court's certification. The Ninth Circuit was presented with this case, and also with the Alaska Superior Court memorandum decision in *Ciarochi*, which held that sexual abuse of a minor is not within the scope of a scoutmaster's authority (App., 39a), but took it upon itself to decide this issue without reference to any state law.

This Court addressed the extent to which a lower state court decision must be followed in *West v. AT&T*, 311 U.S. 223 (1940), where the decision of an intermediate appellate state court had been disregarded by a federal court:

> State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data

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Eckman v. Baker, 224 F.2d 954, 956 (3d Cir. 1955) (decisions of state trial courts controlling on federal courts if a sufficient body of *nisi prius* decisions exists to form consensus of legal thought)), *cert. denied*, 365 U.S. 817 (1961); *Robles v. Folsom*, 239 F.2d 562, 564 (2d Cir. 1956) (decisions of N.Y. Surrogate's Court will be followed where they are in accord, and there is no disapproval by higher courts), *cert. denied*, 353 U.S. 960 (1957).

> what the state law is and apply it rather than to prescribe a different rule . . . .
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> . . . [*t*]*his is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.*

Id. at 237 (emphasis added).

As in *West v. AT&T*, the Ninth Circuit should have followed the decision of the Alaska state court "rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court," a decision that the Alaska Supreme Court elected not to review when requested by the district court in this proceeding.[10] *See also Fidelity Union Trust Co. v. Field*, 311 U.S. at 179 (trial court's decision was entitled to the same respect as a decision of the state's highest court where it was the only law on point and there were no conflicting state decisions); *Commissioner v. Estate of Bosch*, 387 U.S. at 471 (Douglas, J., dissenting) ("[W]here . . . a state court has reached a deliberate conclusion, where it has construed state law, the federal court should consider the decision to be an exposition of the controlling state law and give it effect as such.").

The situation created by the Ninth Circuit in failing to follow the Alaska trial court decisions is precisely the one that the *Erie* doctrine was designed to prevent—the existence of one rule of state law for litigants in state court and another for litigants in federal courts,

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[10] As this Court summarized in *West v. AT&T*:

> We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.

Id. at 238.

due solely to the fortuity of diversity of citizenship. If a federal court is free to ignore lower state court decisions that are precisely on point, inconsistent rulings between the state and federal courts on the same or similar factual bases will proliferate. For example, a plaintiff with a cause of action against multiple defendants could bring a test case in state court and, if the outcome were not to his liking, bring the same claim against other defendants in federal court knowing that the federal court was not bound in any way to follow the state court judgment.

In this instance, the Alaska trial court decisions carry all the indicia of the law of the state—they are consistent, they are not contradicted by other Alaska state court decisions, and the state's highest court has chosen not to overturn them. The Alaska Supreme Court's denial of review is tacit acceptance of these decisions. The Ninth Circuit, however, used that denial as a pretext for substituting its own ruling that McQuade's criminal acts of child molestation were within the scope of his duties of employment. At the very least, these state court decisions constitute evidence of Alaska law. The Ninth Circuit gave them no regard whatsoever.

B. At the Very Least, the Ninth Circuit Should Have Considered Relevant Alaska Decisions in Deciding Alaska Law.

Because state law provides the basis for respondent's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law. *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2056 (1994) (Stevens, J., concurring). The Ninth Circuit, however, neither cited nor discussed any Alaska law in reaching its decision regarding the scope of McQuade's duties of employment.[11]

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[11] In addition, the Ninth Circuit failed to examine relevant state law on policy interpretation. Thus, the court of appeals looked

This Court should hold that, at a minimum, the Ninth Circuit should have looked to relevant Alaska law before creating its own rule of law. *See Fidelity Union Trust Co. v. Field*, 311 U.S. at 177; *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. at 189 n.7 (1941) ("In determining what is the law of a state, we look to the decisions of lower state courts as well as to those of the state's highest court . . . ."). As this Court stated in *West v. AT&T*, 311 U.S. at 237, "it is the duty of the [federal court] in every case to ascertain from *all the available data* what the state law is and apply it rather than to prescribe a different rule[.]" (emphasis added). This has, at other times, been expressed by this Court as giving "proper" regard to a state trial court decision. *See, e.g., King v. Order of United Commercial Travelers*, 333 U.S. at 160-61 (circuit court of appeals "properly attributed some weight" to state trial court decision, though state court decision not binding); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (in absence of ruling by state high court, federal courts must give " 'proper regard' " to relevant rulings of other courts of the state before applying what they find to be state law).

Because the Ninth Circuit failed even to consider relevant state law, it must have applied law that, at best, could only be called " 'federal general common law.' " This is impermissible. *O'Melveny & Myers v. FDIC*, 114 S. Ct. at 2053.

Having avoided looking at actual Alaska law, the Ninth Circuit freed itself to create an exception to Alaska public policy that acts of intentional harm not be covered by insurance. Following Alaska law on *respondeat su-*

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only to McQuade's job title and failed to consider whether the quality and character of the acts of sexual abuse constituted "professional services." *See American Motorists Ins. Co. v. Republican Ins. Co. v. Republican Ins. Co.*, 830 P.2d 785 (Alaska 1992) (defining the phrase "professional services").

perior would have denied the Ninth Circuit the opportunity to pursue its agenda of re-writing Alaska public policy. This is precisely what a federal court with diversity jurisdiction is not supposed to do. A federal court is not free to reject a state rule even if it thinks the rule is unsound or another is preferable. *West v. AT&T*, 311 U.S. at 238.

C. Allowing Insurance Coverage for Child Molestation Flies in the Face of Jurisprudence in the United States.

In this instance, the Ninth Circuit boldly created what *it* considered Alaska public policy *should* be. Not only is the Ninth Circuit's conclusion contrary to all indications of Alaska law, it is unsupported by the decision of *any* high court in this country. In February 1991, the California Supreme Court, in a case involving the question of insurance coverage for child molestation, looked around the country:

> Although we are not bound by decisions of other states' courts, particularly in a case of statutory construction, they do reflect that our decision is in the mainstream on this issue. . . . *To allow coverage for child molestation would be contrary to the almost unanimous rule in other states. . . . We are not aware of any decision by a state's high court that allows coverage for child molestation.*

J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d 1009, 278 Cal. Rtpr. 64, 804 P.2d 689, 699 (1991) (emphasis added).

This unanimity reflects public policy concerns that transcend state boundaries. Clearly, the Ninth Circuit's departure from Alaska decisions as well as the mainstream of judicial thought in general affects the rights and liabilities of insureds and insurers beyond the parties to this litigation and cries out for reversal by this Court.

CONCLUSION

The petition should be granted and the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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